WORKERS' COMPENSATION INDUSTRIAL COUNCIL

SEPTEMBER 19, 2013

Minutes of the meeting of the Workers' Compensation Industrial Council held on Thursday, September 19, 2013, at 1:00 p.m., Offices of the West Virginia Insurance Commissioner, 1124 Smith Street, Room 400, Charleston, West Virginia.

Industrial Council Members Present:
Bill Dean, Chairman
Kent Hartsog, Vice-Chairman
James Dissen
Dan Marshall

1. Call to Order

Chairman Bill Dean called the meeting to order at 1:00 p.m.

2. Approval of Minutes

Chairman Bill Dean: The minutes of the previous meeting were sent out. Did everybody have a chance to look them over? Is there a motion for approval?

Dan Marshall made the motion to approve the minutes from the July 18, 2013 meeting. The motion was seconded by Kent Hartsog and passed unanimously.

3. Office of Judges Report – Alan Drescher, Deputy Chief Administrative Law Judge

Judge Drescher: There is nothing that stands out one way or another in this month's report. I'll highlight some specific areas, and I would be happy to address any questions that anyone might have. For the month of August our office acknowledged 386 protests, and our projection for calendar year 2013 is just under 4,800. We received 3,161 protests as of the end of August. The percentage of Old Fund protests continues to decline, and has been the case for some time now. They were just over 10% of the protests we received for the month of August; and over 11% of the protests received for the year. I think that's pretty much expected. We currently have 3,147

protests pending in our office, and that number has been consisted over the last four months – between 3,129 and 3,148 – so it appears to be stabilizing.

We continue to do a fairly good job with getting our decisions out on a timely basis. We got approximately 97% out within 60 days; and over 99% of them out within 90 days. That's a brief summary of the activities in our office related to the month of August. I would be happy to answer any questions.

Chairman Dean: Mr. Dissen, any questions?

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

4. General Public Comments

Chairman Dean: We'll move onto general public comments. Does anyone from the general public have a comment today? [No comments from the public.]

5. Old Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under old business?

Chairman Dean: Mr. Dissen?

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, Mr. Chairman.

Chairman Dean: Mr. Pauley?

Andrew Pauley, General Counsel, OIC: No, sir.

6. New Business

Chairman Dean: Does anybody from the Industrial Council have anything they would like to bring up under new business?

Chairman Dean: Mr. Dissen?

James Dissen: No, sir.

Chairman Dean: Mr. Hartsog?

Kent Hartsog: No, sir.

Chairman Dean: Mr. Marshall?

Dan Marshall: No, sir.

Chairman Dean: Mr. Pauley?

Andrew Pauley, General Counsel, OIC: Just a couple of things. One is old and one is new. It is my understanding that the State Bar met within the past week, and they continue to discuss Access to Justice issues. Apparently there was an issue concerning the ability of an attorney to get a claims file from a carrier [pre-litigation]. This case was not in litigation. It is my understanding that if there is an attempt to get a file while it is in litigation – and Judge Drescher is here – they will generally work out a Protective Order or some type of dissemination of a claims file. But this was "pre-litigation". . .and others here may want to discuss it. It appears there was a subcommittee appointed to look at it to possibly bring solutions or questions to us, and if we believe it is necessary we would bring a potential rule change or a modification [to the Industrial Council]. I wanted to give you a heads up on that one.

Mr. Hartsog: Could you give us an example? When you say "pre-litigation," their attorney wants to get a file?

Mr. Pauley: Yes, from a carrier. There may have been claim decisions made before the attorney got involved. The attorney wants a copy of the "claims file" to investigate, I guess, whether they want to take the case or not. I can't speak for what the various reasons would be. At this point there is not anything in the statutes or rules that require a carrier to provide that. In litigation it is easier because you have a Judge and they will issue a Protective Order, because there could be confidential private information in there. There is also a need to look at the file for attorney/client privileged information; reserve information that may be confidential and privileged that wouldn't have to be given out. This is also a transition issue because as the Old Fund – and we were a State fund, obviously a monopolistic fund – we continue to try to provide that information. We were the document repository for the file. It's a little different now with it being an open market, and private carriers having their own files and those kind of issues. I am just anticipating issues. Again, there could be other issues here that I'm totally missing. Some of the issues. . .whether the carrier would then have a duty to provide a copy of that file pre-litigation; what they have to provide; how many times they have to provide it. This would include, I'm sure, self-insured employers also. How often it has to be provided; the balancing of interest between the claimant's need to have a file; there may be additional costs to the entity; additional need for attorney fees, and those kind of issues, to review files before they're disseminated. There may be litigation over turning it over. But most insurance claims absent workers' compensation, it is usually worked out with a Protective Order, and certain things are told. They can't be disseminated, and they can't be given out. A Judge can decide if something is privileged, and it doesn't have to be given out, and those kind of issues.

Mr. Hartsog: Does a claimant have the ability to get their file from a carrier if they choose to?

Mr. Pauley: That's the whole issue.

Mr. Hartsog: Well, I understand. But can a claimant ask for it versus the attorney?

Mr. Pauley: I think it varies. Technically a claimant – in a workers' compensation situation – is not a first party claimant. The employer or whoever has the policy or whoever the self-insured employer is, they are the first party. That would be different, of course, from a homeowner's policy where the claimant could very well be the first party – the person that owns the policy – and therefore you are entitled to information. That's

another issue we've got to look at because it's not technically a first party request for their own file, that's in contractual privity. But at the same time we want people to have access and the ability to pursue their claim, and we don't want impediments there. We just want to hear what everybody's got to say. Give everyone the ability to come forward and let us know. Again, we weren't in these meetings. We've had some people that were present that let us know that this occurred. It is my understanding they are going to bring these suggestions to us. Of course, we would turn them over to you.

James Dissen: Mr. Pauley, is this an isolated situation, or has there been a number of these issues?

Mr. Pauley: I think this has come up a couple of times. Again, with the Access to Justice that Chief Justice Benjamin is chairing, and the attorney fees I've talked about, the change in the law on that, I think this is kind of a. . .I don't want to say "a secondary issue," but yes that was their main issue to move forward. Some of the other issues will be recognition of attorney representation and those kind of issues. It is a complex issue because workers' comp is so much different from a personal injury action where you have lump sum settlements and one-time payments. Here you might have a string of benefits that are being paid over a period of time, and we want to make sure the claimant gets it. Attorneys come in and out. Sometimes attorneys settle the indemnity portion they get out of the case. We still have medical payments. All of that has been looked at. The primary thing that anybody wants to do is get the claimant their benefit check. They don't want anything to hold that up. Again, there is no requirement at this point in the Code or the Rules that require it. Obviously, the attorney has a lien against the file of their client. Then you are forced into litigation between an attorney and their client. The way it was portrayed to me, this was pre-litigation. And, yes, that's different from. . .you've noticed your appearance; call a discovery to prosecute your case or defend your case. This is prior to the fact. I really don't want to characterize. . .I appreciate your question. I'm sure there are people out there who feel real strongly about it, and others that probably think it is an anomaly.

Mr. Dissen: Thank you.

Chairman Dean: Mr. Dissen, do you have any other questions?

Mr. Dissen: I do not, sir.

Chairman Dean: Mr. Hartsog?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No, Mr. Chairman. I would like to hear to from Mr. Bowen.

Chairman Dean: Henry, do you have a question, sir?

Henry Bowen, Executive Secretary of the West Virginia Self-Insurers' Association: I was at the Bar meeting. And this is a carryover, as Andrew mentioned, from the Access to Justice Commission Study – a claimant access to legal issues in West Virginia. I tried to explain to many of the claimant representatives at the Bar who feel that this body has not been responsive to their previously announced concerns that these kinds of issues come up, and suggested to them that all of the data that I've heard about – it is not a large number of companies – it is only a small number of out-of-state companies that have apparently gotten used to other types of systems. So, when a non-litigated claim engagement takes place, normally what happens is the person will come in, hire the lawyer, they will sign a contract, which of course is provided for in Article 5 of Chapter 23, and then the lawyer will write the carrier and say, "I represent John Doe and I need his or her file," and there is no response. The clock is running on a 60-day protestable order. The claimant doesn't have the file materials or any other orders or whatever, which is frequently the case. People don't have complete files. They will go to the lawyer and say, "You'll have to get this file for me." Typically, under the Procedural Rules that the Office of Judges administers, we can't issue an administrative subpoena for documentation. We have that authority under the Administrative Rules. When you serve it and you are not in litigation there is no enforcement. We cannot go to the Office of Judges and say, "We need you to enforce this subpoena against a company in Michigan," because there isn't any issue in front of the Office of Judges, and therefore they don't have jurisdiction of the issue.

Rule 1 used to contain a clear obligation of the prior agency to turn over claims to claimant representatives. Rule 1 was modified a couple of years ago, and the post transition issue – once the agency went away – the previous Commissioner felt it was appropriate to recommend to you all [Industrial Council] that that provision be amended, and it was taken out of Rule 1. So there is nothing in the Rule or in the underlying statute that authorizes the Rule that requires a carrier to provide a file. And as Andrew was saying, there are a host of issues on carriers' definitions of "file material" – what's protected, what's not protected, and all these other things.

I know you would want to know before you address a rule how significant is the problem. There is no way of getting accurate objective data. I don't think it's significant.

But in fairness, if you're engaged as an attorney to represent an injured worker and you can't get access to his/her file, then there is a question under the code of professional responsibility whether you are doing your job if you don't take whatever means which might be available to try to get that. The only alternative currently is to make a consumer complaint. They can file a Protective Protest, of course, to protect the rights of the injured worker.

It goes to the fundamental debate on how one looks at litigation. If you look at it as a part of workers' comp insurance that you would prefer to see continue to decline – as the data reflects in West Virginia – a continuous decline in the volume of litigation, then that might be a desirable public policy. But it is, nonetheless, a statutory right. Even though it sounds a little patronizing for a lawyer to say this – I always look at it as a protestable right of a man or woman who is injured as their last protection in this kind of statutory scheme. It is their right to get away from a carrier or a self-insured who is making the decision, and go to an objective body – the Office of Judges – and then go through that administrative review system, or up to the Supreme Court. I don't look at it as a complaint that somehow incense people to want to litigate just to litigate. It is fundamentally a part of the lawyer's ability to do his or her job. So, that committee is reenergizing. If the Council is not interested in having any rule assessments, they indicate they're going to go the legislative route, and that they intend to go through the full Access to Justice Commission, and therefore would seek legislation to address whatever shortcomings they perceive the current system has that precludes what they are characterizing as an injured worker's right or access to proper representation.

Again, BrickStreet is probably the best example. Not only are they our only domestic workers' compensation carrier, but they are universally recognized by everyone in the Bar of doing it the right way in terms of making information available. They are the perfect model for the insurance world to follow in West Virginia because they understood it right from the get-go because they used to administer it when they were the monopoly.

Some out-of-state claims are managed in ways where people are just not responsive to claimants' lawyers, and they don't have a legal remedy. This committee is working on this process. It's really your policy decision, it seems to me, to make whether you want to address things like that through rules or rather let those folks deal legislatively. Those who represent the employer community are always fearful that legislative remedies are the most troublesome because of the 134 members. There is only a handful up there that understand workers' comp and workers' comp claims. Obviously we prefer to see rules take care of things that can take care of issues that need to be addressed as opposed to just statutory changes. But that is really your

policy decision. That's what they're doing, and this committee is reenergized. They were going to send some claimant representatives to talk to you today, and I urged them to gather more information before they did that. I thought the first thing – by watching you all in action – the first thing you would want to know is how prevalent an issue they were identifying, and I don't think there is a consensus. It isn't a huge issue. But if you are the person being engaged it becomes a very big thing if you can't get your client's file. I'm not sure what alternatives might be available, but some probably need to be addressed. Thank you for letting me speak out of turn.

Chairman Dean: Mr. Dissen, do you have any questions?

Mr. Dissen: Henry, I appreciate your comments. The only comment I would have is that this committee, and being a member of the Bar. . .and I think you said that they felt that this Council was not responsive. I take exception to that. I think in the past. . .with the new administration here. . .in the past we've been known to be somewhat argumentative. But I think the way this is being handled now is very professional and businesslike, and if something comes before us we will certainly address it. On the other hand, a veiled threat to say, "If you're not responsive then we'll go legislatively," I would just tell your colleagues that doesn't set real well with this member of the Bar.

Mr. Bowen: I don't mean to do anybody an injustice about suggesting that there were any threats, and I apologize for that comment. Because what they were referencing was that one or two claimants' representatives have addressed the Council before and have characterized that process as a process that didn't resolve. . .what they perceived to be any interest in addressing what they were talking to you about. I've heard a number of those comments, and that's unfair criticism. I just tried to explain, as a Bar member, that your responsibility in terms of administration of policy and working with the Insurance Commissioner, that rule making wasn't intended to be just. . .if some individual person had a complaint that you would say, "Oh, sure we'll modify a rule." You had to give sufficient facts to assess objectively whether or not there was an issue that needed to be addressed through your rule making authority, and working with the Commissioner and the staff. Chief Justice Benjamin has publicly stated, which is predictable, that he was well pleased with the commission's work last year, and the legislative changes that resulted from that. In a non-legal community, Mr. Dissen, they view all of that as just a bunch of lawyers getting together looking out for lawyers. And I've even heard some of your colleagues from time to time express that concern about lawyers looking out for lawyers. I realize that those issues are out there, and understand why someone would do that. I just don't think it's healthy in my personal opinion to see a committee of, if you will, lawyers pushing policy recommendations that

don't include all of you in the policy discussions. We lawyers who do claims sometimes just assume that our vision of the claims process is a vision that should be understood and shared by everybody, and I realize that many of you may have a different perspective about some of the legal issues we encounter in representing people in this process. But overall, as the most recent NCCI meeting, the data that's there nationally shows that you are involved in overseeing a change that has been enormously successfully. And I don't doubt that there will ever be an end to the individual complaints about shortcomings of carriers or claims administrators or self-insureds or anybody else any time somebody feels aggrieved, but overall I don't think there is any data that suggests that we are doing things horribly, and everybody else is out of step. Quite the contrary. I think you all should feel proud at what you've overseen. It has been an enormously successful transition to a fully competitive market. I think we are looked upon now so favorably from a national perspective. We're looked upon as one of the success stories. They are anecdotal, but at the same time there are issues that shouldn't be ignored, but on the other hand I'm not sure what the remedy is. I thought it was something you should be aware of because I'm sure you will be hearing from some who might have a stronger point of view about the need for changes.

Mr. Dissen: I appreciate that. I think when things are presented by Mr. Pauley it is done in a neutral position. I think under Mr. Dean's leadership, what groups the Council members supposedly represent; labor, management, academia, etc., is set aside when it comes to legitimate claimant issues. When it comes down to what is best for the claimant, I think we're all in lockstep, that we'll take care of that and then we'll figure out how the other is impacted. I would just suggest to your colleagues if they have something then bring it to us in a professional manner and we'll address it.

Mr. Pauley: I would concur that we obviously want to see the data and the problem. Apparently this one incident. . .and I don't have the facts. I wasn't there. But they may have used a subpoena pre-litigation which would have been inappropriate potentially. If the company responded then we don't have to respond to that subpoena because it was being used inappropriately. Things can escalate. For the record, I want to be clear that we do have high level complaint meetings every week. I don't want to downplay the fact that when a complaint is filed with the Commissioner the entity is contacted, and the matter is discussed, and it is looked at, and it is also data mined. If we see trends, if we see issues, we address those. I know sometimes in meetings things are said and the appropriate representatives are not there and people speculate. I just want to be clear that we take complaints very seriously. I can say that every complaint that is filed with the Commissioner is handled in an aggressive manner and looked at and taken care of.

Chairman Dean: Very good. Mr. Hartsog, do you have any comments or questions?

Mr. Hartsog: No.

Chairman Dean: Mr. Marshall?

Mr. Marshall: No. I think Mr. Dissen covered it very well.

Mr. Pauley: I have a couple more things. Another thing, which I hope is a lot less controversial. As many may know we are moving to ICD-10 Coding in the medical community. Our Rule 20 talks about ICD-9 Codes. So, we're thinking about how we want to address that. We may look at an informational letter rather than open that Rule back up at this point. We are open to thoughts, and we want to put that out there. We will continue to explore that. My predecessor. . .I'm not sure. . .I don't know if all of the informational letters were brought before the Industrial Council. But it is my intention to make you aware of it and understand it because those can have the effect of a Rule or law. If we are going to send an informational letter out we want you to be aware of it, be able to comment on it, and get your thoughts back on it before that goes out.

Lastly, I have a handout. I'm sure everybody already knows this. This is just a refresher, but we've had a couple of recusals in the last couple of weeks. The Ethics Act puts out a flyer on handling recusals, and I wanted to give that to you. They are saying that if you're recusing yourself from a vote, they would like for you to leave the room – not be present during the vote or any discussion concerning it. I don't think it is a problem here or has been. Obviously, you have your own thoughts on ethics.

Chairman Dean: Very good, sir.

7. Next Meeting

Chairman Dean: We'll move onto the next meeting. It is tentatively set for December 5. We are going to discuss the concerns and conflicts in the Executive Session. So, the next order of business is Executive Session.

8. Executive Session

Chairman Dean: The next item on the agenda is related to self-insured employers. These matters involve discussion as specific confidential information regarding a self-insured employer that would be exempted from disclosure under the West Virginia Freedom of Information Act pursuant to West Virginia Code §23-1-4(b). Therefore it is appropriate that the discussion take place in Executive Session under the provisions of West Virginia Code §6-9A-4. If there is any action taken regarding these specific matters for an employer this will be done upon reconvening of the public session. Is there a motion to go into Executive Session?

Mr. Marshall: So moved.

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded to go into Executive Session. Any question on the motion? All in favor, "aye." All opposed, "nay." The aye's have it. Motion passed.

[The Executive Session began at 1:29 p.m. and ended at 2:17 p.m.]

Chairman Dean: Upon reconvening the regular session, the Resolution is for the renewal of self-insured status of the 27 companies on page two and three. Is there a motion to approve?

Mr. Marshall: So moved, Mr. Chairman.

Mr. Dissen: Second.

Chairman Dean: A motion has been made and seconded to approve the self-insured status of the 27 companies. Question on the motion? All in favor, "aye." All opposed, "nay." The aye's have it. [Motion passed.]

Is there any other business that needs to be taken care of under regular session?

9. Adjourn

Chairman Dean: Is there a motion for adjournment?

Mr. Hartsog made the motion to adjourn. The motion was seconded by Mr. Dissen and passed unanimously.

There being no further business the meeting adjourned at 2:18 p.m.